No. 18-966

IN THE

Supreme Court of the United States

DEPARTMENT OF COMMERCE, *ET AL.*,
Petitioners,

v.

STATE OF NEW YORK, *ET AL.*,
Respondents.

On Writ of Certiorari Before Judgment
to the United States Court of Appeals
for the Second Circuit

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENTS

SHERRILYN A. IFILL
JANAI S. NELSON
SAMUEL SPITAL
LEAH C. ADEN
AARON SUSSMAN
J. ZACHERY MORRIS
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200

DAVID J. ZIMMER
Counsel of Record
JOSHUA J. BONE
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210
(617) 570-1000
dzimmer@goodwinlaw.com
TIFFANY MAHMOOD
WILLIAM UHR
MADELINE DILASCIA
GOODWIN PROCTER LLP

Counsel for Amicus Curiae

April 1, 2019

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Adding the Citizenship Status Question would undermine racial equity by exacerbating the Black population undercount. 4

A. The census has historically undercounted the Black population. 5

B. Inclusion of the Citizenship Status Question in the census would particularly harm Black people. 10

C. A complete and accurate count is necessary for racial equity. 24

II. LDF and other civil rights organizations' vast experience litigating under the Voting Rights Act confirms that the Citizenship Status Question is unnecessary to enforce Section 2 of the Act. 30

CONCLUSION 37

TABLE OF AUTHORITIES

Page(s)

Cases

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135 S. Ct. 1257 (2015) 1

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INTEREST OF AMICUS CURIAE[1]

Amicus, the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), is a non-profit, non-partisan law organization established under the laws of New York to assist Black people and other people of color in the full, fair, and free exercise of their constitutional and statutory rights. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on eliminating racial discrimination in education, economic justice, criminal justice, and political participation, using various tools including census data.

LDF has been involved in numerous precedent-setting cases relating to minority political representation and voting rights before state and federal courts. *See, e.g.*, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S.

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[1] Counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part and that no person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties filed blanket consents to the filing of amici briefs.

130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1977); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973). Specifically, LDF has successfully raised claims under the Voting Rights Act of 1965, its amendments, and the U.S. Constitution to defend and protect minority voting rights using census data—without the inclusion of a citizenship status question on the decennial census—for over 50 years.

LDF has a significant interest in ensuring that the protections of the U.S. Constitution and the Voting Rights Act are properly enforced and that Black communities are fairly and fully counted in the decennial censuses.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since its inception, the United States census has undercounted the Black population of the United States both to their detriment and the detriment of the U.S. Constitution's mandate of "actual Enumeration." The disproportionate undercounting of Black people, which has persisted through the most recent censuses, has enormous practical implications. Accurate census data is essential to the equitable allocation of political representation and government resources. Any revision to the methods for conducting the census should seek to remedy the racial disparity in enumeration, and certainly not *exacerbate* it.

Yet exacerbating that racial disparity would be precisely the result of starting—for the first time in 70 years—to ask respondents about their citizenship status on the decennial census questionnaire (the "Citizenship Status Question"). As the district court recognized, that question is likely to chill the participation of vulnerable immigrant communities—which Black people are both a part of and live in proximity to—particularly given the hostile rhetoric that characterizes contemporary immigration policy and escalated efforts to identify and deport potentially removable immigrants. Indeed, given that the makeup of the immigrant population includes a sizeable population of Black immigrants and noncitizens, decreased census participation would almost certainly impact the already significant and disproportionate undercount of the Black population, heightening the inequality in representation and access to resources that necessarily accompanies it.

The Government attempts to justify the addition of the Citizenship Status Question with the remarkable assertion that it would actually *help* Black people and other people of color because it is purportedly necessary to enforce Section 2 of the Voting Rights Act of 1965. As one of the organizations with the most experience litigating Section 2 claims, LDF can assure this Court that this assertion is unequivocally wrong. LDF has successfully brought Section 2 suits for decades, and these voting rights cases have never been hampered by the absence of citizenship data drawn from the decennial census. Indeed, as the district court found, other available data is more accurate for these purposes than the new census data sought through the inclusion of the Citizenship Status Question. Fellow civil rights groups and the Jus-

tice Department itself (until 2017) have consistently agreed that they do not view a citizenship status question as necessary to protect minority voting rights. In fact, the addition of the question is likely to have the exact opposite effect.

Given the Government's implausible and unsubstantiated justification for the addition of the Citizenship Status Question on the decennial census, and the harms that it would cause to Black and other communities, this Court should affirm the judgment of the district court.

ARGUMENT

I. Adding the Citizenship Status Question would undermine racial equity by exacerbating the Black population undercount.

The addition of a question about citizenship status to the 2020 decennial census questionnaire threatens to exacerbate a long and well-documented record of undercounting the Black population.[2] Black people

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[2] Between 1970 and 2000, the U.S. Census Bureau used two questionnaires. Most households received a short-form questionnaire, while selected households received a long-form questionnaire with additional questions. The 2010 Census had just one questionnaire consisting of ten questions. *See Questionnaires - History - U.S. Census Bureau*, Census.Gov https://www.census.gov/history/www/through_the_decades/questionnaires/. Questions concerning citizenship first appeared in the long-form 1820 Census, questions regarding place of birth first appeared in the long-form 1850 Census, and questions regarding year of entry first appeared in the long-form 1890 Census. These questions were moved to the American Community Survey in 2005 when it replaced the decennial census long form. *See Why We Ask About... - Place of Birth, Citizenship, Year of Entry – American Community Survey, U.S. Census Bureau,*

will be both directly and indirectly harmed as noncitizens, as immigrants, and/or otherwise as members of hard-to-count communities.

The census is far more than a routine bureaucratic exercise. Its count of the national population shapes numerous critical decisions, including the allocation of elected representatives to States, the development of congressional and state legislative districts, and the distribution of billions of dollars of federal and state funds. Undercounting the Black population directly deprives Black people of equal political representation and equal access to government services. In short, the systemic undercount facilitates and amplifies race-based discrimination. Thus, any change to the census that threatens to increase this historical and ongoing record of racial undercounting should be subject to intensive scrutiny.

A. The census has historically undercounted the Black population.

The decennial census traces back to the shameful era of chattel slavery and the Constitutional Convention of 1787, when the Framers established that seats in the House of Representatives should be apportioned to States on the basis of total population. *See* U.S. Const., art. I, § 2, cl. 3; *see also Evenwel v. Abbott*, 136 S. Ct. 1120, 1127 (2016) (outlining this history). The Framers understood that this apportionment created incentives for manipulating population figures, and "that the calculation of populations could be and often were skewed for political or

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Census.Gov, https://www.census.gov/acs/www/about/why-we-ask-each-question/citizenship/.

financial purposes." *Utah v. Evans*, 536 U.S. 452, 500 (2002). To limit the opportunity for population distortion, and in an attempt to increase the accuracy of population counts, the Framers required that Congress "direct" an "Enumeration" of the entire population at least every ten years. *See* U.S. Const. art. I, § 2, cl. 3; *see also Wesberry v. Sanders*, 376 U.S. 1, 13-14 (1964).

Shortly after the first U.S. census, the Framers became concerned that undercounting might have marred the results. *See* Christopher M. Taylor, *Vote Dilution and the Census Undercount: A State-by-State Remedy*, 94 Mich. L. Rev. 1098, 1101 (1996). But these concerns did not extend to the undercounting of Black people. At that time, enslaved Black people were treated as only three-fifths of a person and excluded by law from representation. *See NAACP v. Bureau of Census*, No. PWB-18-891, 2019 WL 355743, at *1, *4 (D. Md. Jan. 29, 2019).

It was not until the end of the Civil War that the links between census undercounting and race began to emerge clearly. During the Reconstruction era, the country ratified the Thirteenth Amendment, which nullified the distinction between "free Persons" and "all other Persons" in the Census Clause, and the Fourteenth Amendment, which eliminated the "three-fifths" calculation in the Census Clause. U.S. Const. amend. XIII, amend. XIV, § 2. Although these changes and others provided for the political representation of Black people, the census quickly proved an imperfect tool for protecting these new rights.

In the 1870 census, the first after the enactment of the Thirteenth and Fourteenth Amendments, Black

people were "egregiously undercounted . . . but lacked the political clout to secure a recount." Samuel Issacharoff & Allan J. Lichtman, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Representation*, 13 Rev. Litig. 1, 6 (1993). Instability in the American South made it extremely difficult to accurately administer the census. *See* Margo J. Anderson, The American Census: A Social History 89 (1988). Despite the undercount of the Black population by approximately 10 percent, there was no significant push for a recount because the South was "already reaping a bonus in congressional seats and electoral votes." *Id.* at 89-90.

Although policymakers were thus aware of systemic racial undercounting as early as the 1870 census,[3]

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[3] Policymakers during this period exacerbated the harms of racial undercounting by ignoring census results that demonstrated racial inequalities. For instance, in the opening half of the Twentieth Century, the census showed "a massive population shift away from rural areas and toward suburban and urban communities" as Black Americans, alongside many other groups, migrated to cities in the Northeast, the Midwest, and the West. *Evenwel*, 136 S. Ct. at 1123. Representatives from rural districts, however, "benefited from malapportionment [and] had scant incentive to adopt new maps that might put them out of office." *Id.* Thus, "many States ran elections into the early 1960s based on maps drawn to equalize each district's population as it was composed around 1900," depriving racially and ethnically diverse cities of equal representation, while concentrating power in less populous, white regions. *See id.*; *see also* Agency History - U.S. Census Bureau, Census.Gov, https://www.census.gov/history/www/census_then_now. It was not until this Court's one-person, one-vote cases in the 1960s that States were finally forced to remedy a discrimination that the census had long made plain. *Evenwel*, 136 S. Ct. at 1124 (noting that the one-person, one-vote cases "instructed that ju-

the Census Bureau only began documenting the census undercount—including with respect to the Black population—following the 1940 census. The extent of the undercount became impossible to ignore when the number of Black men who registered to fight in World War II seemed implausibly large in light of the total number of Black men counted in the census. *See* David A. Graham, *The Unpredictable Political Effects of 2020 Census Tinkering*, The Atlantic (June 25, 2018).[4] The Census Bureau ultimately determined that the undercount for the entire population in the 1940 census was 5.4 percent, but that the undercount was only 5.0 percent for the white population, as compared to 8.4 percent for the Black population. *Wisconsin v. City of New York*, 517 U.S. 1, 7 (1996).

This 3.4 percent disparity between the census undercount rates for the Black and white populations widened over time. For example, by 1980, while the overall population undercount had shrunk to an estimated 1.2 percent, the undercount for the Black population was 3.7 percent higher than the undercount for the non-Black population. *See 1980 Overview – History – U.S. Census Bureau*, Census.Gov.[5] In the 1990 census, the disparity between the undercount rates for the Black and white populations increased yet again to 4.4 percent. *See* Peter Skerry,

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risdictions must . . . regularly reapportion districts [based on up-to-date data] to prevent malapportionment").

[4] Available at https://www.theatlantic.com/politics/archive/2018/06/the-unpredictable-political-effects-of-trumps-census-moves/563645/.

[5] Available at https://www.census.gov/history/www/through_the_decades/overview/1980.html.

Counting on the Census?: Race, Group Identity and the Evasion of Politics 82 (2000). Most recently, in 2010, the census failed to count over 800,000 Black people (2.1 percent), while *overcounting* non-Hispanic white people by 0.8 percent.[6] *See Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census – 2010 Census – Newsroom – U.S. Census Bureau*, Census.Gov (May 22, 2012).[7]

As explained at pp. 25-26, *infra*, the persistent undercount of the Black population has dramatically undermined the quality of political representation for Black people, as well as their access to opportunities and civil rights protections more generally. These detrimental effects are compounded by the gap between the Black population undercount and the white population *overcount*, which results in an inequitable distribution of political and economic resources, harming undercounted communities while simultaneously over-resourcing overcounted communities. *See* 2020 Census Fact Sheet, Census Accuracy and the Undercount: Why It Matters; How It's Measured, Funders Comm. for Civic Participation 2 (2017) (explaining the differential undercount in the 2010 census).[8]

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[6] Specific events that happen shortly before a decennial census, such as the 2008 economic crisis, disproportionately harm people of color and can exacerbate the undercount.

[7] Available at https://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html.

[8] Available at https://funderscommittee.org/wp-content/uploads/2017/01/FCI2020-FactSheet-Census-Accuracy-Undercount-Fall2016.pdf.

The attempt to add the Citizenship Status Question to the decennial census is the latest chapter in a long history of manipulation of the census that has disadvantaged Black communities. Based on the false and pretextual claim that current census data is insufficient to enforce Section 2 of the Voting Rights Act, as the district court found, Petitioners seek to add a question that, as discussed *infra*, will fail to produce more accurate data while further harming already undercounted communities and benefiting overcounted communities. *See New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 516, 635-36, 651-54, 660-64 (S.D.N.Y. 2019). The decennial census should be a snapshot of the present, while the Citizenship Status Question is a reflection of a regrettable past.

B. Inclusion of the Citizenship Status Question in the census would particularly harm Black people.

Adding the Citizenship Status Question threatens to deepen the current and historical census undercount of the Black population generally, and of the Black immigrant and noncitizen populations specifically. These groups are already recognized as hard-to-count populations. Given reasonable fears about the abuse of census data to facilitate racially discriminatory immigration enforcement, adding the Citizenship Status Question would further chill census participation rates among Black immigrant and noncitizen persons. And given the prevalence of immigrant-adjacent and mixed-citizenship-status Black families and communities, these chilling effects would have broad implications for Black people in the United States more generally. Thus, adding the

Citizenship Status Question would make an accurate count of the Black population even more difficult to achieve, depriving Black people of vital political and socio-economic opportunities.

1. As explained in more detail below, adding the Citizenship Status Question would likely have a negative effect on census response rates for the Black population generally, and for the Black immigrant and noncitizen populations specifically. Historically and through the most recent census, the Census Bureau has struggled to enumerate hard-to-count populations, including Black people generally, as discussed below, as well as immigrant people, noncitizen people, and other subgroups of which Black people are an appreciable part. Approximately 42 percent of Black immigrant persons do not hold U.S. citizenship. *See infra* at 13. The district court acknowledged Census Bureau findings concerning the overlap between these hard-to-count subgroups and those unlikely to respond to the census because of the Citizenship Status Question. *See New York*, 351 F. Supp. 3d at 515; *see also State of California v. Ross*, Nos. 18-cv-01865-RS, 18-cv-02279-RS, 2019 WL 1052434, at *11 (N.D. Cal. Mar. 6, 2019) ("Census Bureau research shows that there is 'substantial overlap' between these hard-to count subgroups and those households most likely not to respond to the 2020 Census because of the citizenship question." (internal citation omitted)). Specifically, the district court found that the inclusion of a "citizenship question will cause a significant differential decline in self-response rates among noncitizen households." *New York*, 351 F. Supp. 3d at 582. Moreover, the district court found that efforts to remediate the undercount would not work and may in fact exacerbate

the differential undercount of noncitizens. *Id.* at 585-86.

This significant decline among noncitizen communities is compounded by the national political environment. As the district court recognized, "a higher level of concern about using citizenship data for enforcement purposes . . . could also exacerbate the effects of adding a citizenship question," (*id.* at 579 (internal citation omitted)), reducing response rates for Black immigrants for the reasons discussed at pp. 17-24, *infra*. *See also Ross*, 2019 WL 1052434, at *2 ("[A] significant differential undercount, particularly impacting noncitizen . . . communities, will result from the inclusion of a citizenship question on the 2020 Census, compounded by macro-environmental factors arising out of the national immigration debate."). Indeed, even before consideration of the Citizenship Status Question, there had already been documented distrust of the census among immigrant communities and people of color, including confidentiality concerns, as discussed at pp. 17-19, *infra*. The Citizenship Status Question would only deepen this distrust.

2. The effects of the Citizenship Status Question on Black communities must be evaluated in light of the substantial Black immigrant and noncitizen populations, which already have particularly low census response rates. The number of Black immigrant persons in the United States has increased significantly in recent decades. *See* NYU Law Immigrant Rights Clinic, The State of Black Immigrants Part 1: Statistical Portrait of Black Immigrants in the United States 10 [hereinafter The State of Black

Immigrants Part 1].[9] Approximately one-in-ten Black people in the United States are immigrants. *See* Monica Anderson & Gustavo López, *Key facts about black immigrants in the U.S.*, Pew Research Ctr. (Jan. 24, 2018).[10] Of this population, approximately 42 percent do not hold U.S. citizenship, and approximately 15 percent are undocumented. *See id.* Black immigrants have been estimated to comprise 8.7 percent of the overall foreign-born population in the United States, and approximately 7.2 percent of the noncitizen foreign-born population. *See* The State of Black Immigrants Part 1, *supra*, at 11. Black immigrants are largely concentrated in particular communities clustered around metropolitan areas. *See id.* In the New York metropolitan area, for example, Black immigrants make up approximately 28 percent of the Black population. In the Miami metropolitan area, approximately a third of the Black population is comprised of immigrants. *See* Monica Anderson, *A Rising Share of the U.S. Black Population Is Foreign Born*, Pew Research Ctr. (Apr. 9, 2015)[11] [hereinafter Anderson Pew Research Ctr.]; *see also* Migration Policy Institute, A Demographic Profile of Black Caribbean Immigrants in the United States (Apr. 2012) (noting that in 2007, the majority

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[9] Available at http://www.stateofblackimmigrants.com/assets/sobi-fullreport-jan22.pdf.

[10] Available at https://www.pewresearch.org/fact-tank/2018/01/24/key-facts-about-black-immigrants-in-the-u-s/.

[11] Available at https://www.pewsocialtrends.org/2015/04/09/a-rising-share-of-the-u-s-black-population-is-foreign-born/.

of all Black Caribbean immigrants lived in New York and Florida).[12]

The Black immigrant population is particularly vulnerable to census undercounting. Not only are racial and ethnic minority populations generally undercounted, but the Black immigrant population is disproportionately likely to belong to other groups that the Census Bureau has identified as "hard-to-count," including non-English speakers,[13] undocumented immigrants, low-income persons, people who distrust the government,[14] and racial and ethnic minorities.[15] *See* Maryann M. Chapin, U.S. Census Bureau, 2020 Census: Counting Everyone Once, Only

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[12] Available at https://www.migrationpolicy.org/research/CBI-demographic-profile-black-caribbean-immigrants.

[13] Roughly a quarter of Black immigrant people ages five and older are not proficient in English. *See* Anderson Pew Research Ctr.

[14] Census Bureau research has found that "participation in the census could be affected by trust in the government, especially the Federal government," and has observed such distrust at high levels among non-Hispanic Black people. *See* McGeeney et al., 2020 Census Barriers, Attitudes, and Motivators Study Survey Report 47-48 (2019), available at https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2020-report-cbams-study-survey.pdf.

[15] Twenty percent of Black immigrants live below the poverty line, and Black immigrants have the highest unemployment and joblessness rates among all immigrant groups. *See* NYU Law Immigrant Rights Clinic, The State of Black Immigrants Part 1: Statistical Portrait of Black Immigrants in the United States 12-13, http://www.stateofblackimmigrants.com/assets/sobi-fullreport-jan22.pdf.

Once, and in the Right Place 42.[16] Thus, even compared to the U.S. Black population as a whole, the Black immigrant population—including the undocumented Black immigrant population—faces a substantial risk of being undercounted by the census. *See, e.g.*, David R. Williams & James S. Jackson, *Race/Ethnicity and the 2000 Census: Recommendations for African American and Other Black Populations in the United States*, Am. J. Public Health, Vol. 90, No. 11, 1728-30 (Nov. 2000) (noting the concerns of experts that existing estimates of the foreign-born Black population, and estimates of Black people with foreign parentage, are too low).[17] It is therefore hardly surprising that areas with particularly large Black immigrant populations, such as New York City (particularly Kings County), have persistently low census response rates. *See, e.g.*, Census 2020 Hard to Count Map, Mapping Hard to Count (HTC) Communities for a Fair and Accurate 2020 Census.[18]

These low census response rates—and the resulting census undercount for these communities—affect not just Black immigrant and noncitizen populations specifically, but also the Black population in the United States more generally. Significant numbers of non-immigrant Black people live in or near these hard-to-count immigrant and noncitizen communities. *See* Randy Capps, Kristen McCabe, & Michael

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[16] Available at https://www2.census.gov/programs-surveys/decennial/2020/program-management/pmr-materials/10-19-2018/pmr-hard-to-count-2018-10-19.pdf.

[17] Available at https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.90.11.1728.

[18] Available at https://www.censushardtocountmaps2020.us/.

Fix, Diverse Streams: African Migration to the United States, Migration Policy Institute 11-12 (Apr. 2012) (finding that Black African immigrants resided in a heavily concentrated handful of areas, with distribution largely mirroring that of the overall Black population in the United States)[19]; John Iceland & Kyle Anne Nelson, *The Residential Segregation of Mixed-Nativity Married Couples*, Demography Vol. 47, No. 4, 869-93, 887 (Nov. 2010) (finding that foreign-born and mixed-nativity Black households experienced high levels of segregation from non-Black racial and ethnic groups in metropolitan regions)[20]; *see also Ross*, 2019 WL 1052434, at *9 (noting the finding that "the citizenship question will cause a significant decline in self-response rates . . . particularly for immigrants and immigrant-adjacent communities . . ." and defining "'immigrant-adjacent communities' as communities with mixed-status households, where one family member is a U.S. citizen and another family member is not, and communities in which residents would interact with immigrants daily at work, school, or in other similar environments."). It is also common for Black families to have family members with different citizenship statuses. For example, a majority of African and Caribbean immigrants who obtained lawful permanent resident status have been recorded as being immediate relatives of U.S. citizens or otherwise family-sponsored. *See* The State of Black Immigrants Part 1, *supra*, at 14.

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[19] Available at https://www.migrationpolicy.org/research/CBI-african-migration-united-states.

[20] Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3000034/pdf/dem-47-0869.pdf.

Thus, any evaluation of the potential chilling effect of the Citizenship Status Question must take into consideration not just the overall undercount of the Black population, but also the various factors that render the distinct Black noncitizen and immigrant populations particularly hard to count. *See Ross*, 2019 WL 1052434, at *11 ("The Census Bureau has identified four primary obstacles to counting hard-to-count subpopulations: that they are hard to locate, hard to contact, hard to persuade, and hard to interview. For some hard-to-count subgroups, more than one of these obstacles applies. Census Bureau research acknowledges that these obstacles apply to those households most likely not to respond to the 2020 Census because of the citizenship question." (internal citations omitted)).

3. Adding the Citizenship Status Question would further chill census participation among Black immigrants and noncitizens—as well as among Black people more generally—undermining the quality of representation and other opportunities available to all Black people. Even before the formal proposal to add the Citizenship Status Question to the 2020 census, various factors threatened to reduce census participation rates for immigrant populations and communities of color, including concerns about insufficient funding and the confidentiality of the census count. *See, e.g., NAACP v. Bureau of Census*, No. PWG-18-891, 2019 WL 355743, at *7 (D. Md. Jan. 29, 2019) (discussing concerns about cybersecurity threats and increased undercounting of minorities because the Census Bureau is insufficiently funded to prepare for the challenges that digitizing the 2020 census presents, including impacts on communities of color and low-income communities with limited

internet access); Mikelyn Meyers, *Respondent Confidentiality Concerns and Possible Effects on Response Rates and Data Quality for the 2020 Census*, U.S. Census Bureau (Nov. 2, 2017) ("Findings across languages, regions of the country, from both pretesting respondents and field staff point to an unprecedented ground swell in confidentiality and data sharing concerns, particularly among immigrants or those who live with immigrants. . . . Particularly troubling due to the disproportionate impact on hard-to-count populations.")[21]; *see also Ross*, 2019 WL 1052434, at *7 ("This research includes the Census Bureau's Center for Survey Measurement ('CSM') focus group testing in 2017, which revealed increased concern among immigrants about the confidentiality of their survey responses.").

These fears have deep historical roots given that, in the past, the census has been actively used to further governmental discrimination. Data from the 1940 census was notoriously used by the Secret Service to locate Japanese Americans and imprison them in internment camps. *See* Katy Steinmetz, *The Debate Over a New Citizenship Question Isn't the First Census Fight. Here's Why the Count is Controversial*, Time (Mar. 27, 2018).[22] In 2004, data from the 2000 census was used by the Department of Homeland Security to target geographic locations with high concentrations of Arab Americans. *See*

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[21] Available at https://www2.census.gov/cac/nac/meetings/2017-11/Meyers-NAC-Confidentiality-Presentation.pdf.

[22] Available at http://time.com/5217151/census-questions-citizenship-controversy.

Lynette Clemetson, *Homeland Security Given Data on Arab-Americans*, N.Y. Times (July 30, 2004).[23]

These reasonable concerns about confidentiality already dampen census participation rates for Black immigrant people and members of other immigrant communities. And there is near consensus that the addition of the Citizenship Status Question would only amplify this chilling effect. *See New York*, 351 F. Supp. 3d at 648 ("[D]espite Secretary Ross's claim to the contrary . . . there is no evidence in the Administrative Record supporting a conclusion that addition of the citizenship question will *not* harm the response rate."); *Ross*, 2019 WL 1052434, at *9 ("Dr. Barreto observed that the citizenship question is likely to be most sensitive to those who are closer to the immigrant experience or closer to immigrant communities." (internal quotations and citation omitted)); Letter from Mexican American Legal Defense & Educ. Fund to Jennifer Jessup 6-10 (Aug. 7, 2018) [hereinafter MALDEF Letter]; Letter from Asian Americans Advancing Justice to Jennifer Jessup 6-9 (Aug. 7, 2018).

For decades, "the official position of the Census Bureau was that [a citizenship status question] was inadvisable because it would depress the count for already 'hard-to-count' groups—particularly noncitizens and Hispanics—whose members would be less likely to participate in the census for fear that the data could be used against them or their loved ones." *See New York*, 351 F. Supp. 3d at 515; *see also Ross*, 2019 WL 1052434, at *6 ("The macro-environment,

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[23] Available at https://www.nytimes.com/2004/07/30/us/homeland-security-given-data-on-arab-americans.html.

particularly the political environment around immigration, has the potential to amplify the negative effect of the citizenship question on self-response rates."). Despite the radical shift in position of the newest Secretary of Commerce, the staff of the Census Bureau has continued to recognize that the inclusion of the Citizenship Status Question "would likely result in a significant differential decline in self-response rates within noncitizen and Latino communities," and that the "lower response rates will harm the quality of census data." *Ross*, 2019 WL 1052434, at *1, *4. The Census Bureau views as "extremely problematic" the reaction of immigrant, non-white, and Spanish-speaking groups to the proposal to add the Citizenship Status Question—groups that include Afro-Latinx immigrants, who comprise 11 percent of the Black immigrant population. *See* Anderson Pew Research Ctr., *supra*, at 2.

The widespread fears that the Citizenship Status Question has created among immigrant communities and noncitizen people of color have been amplified by increased immigration enforcement and intensifying xenophobic rhetoric in recent years. Black immigrant people have been among the explicit targets of these attacks. For example, the Temporary Protected Status ("TPS") designation for Haitian immigrants—initiated by the U.S. government in response to the 2010 earthquake, and maintained in the wake of a subsequent cholera outbreak, and the hurricanes that have devastated the Haitian population—was terminated in November 2017. Four district courts have recognized that LDF's clients and other parties have asserted legitimate claims that this act was motivated at least partially by racial discrimination. *See NAACP v. U.S. Dep't of Home-*

land Sec., No. DKC 18-0239, 2019 WL 1126386 (D. Md. Mar. 12, 2019); *Saget v. Trump*, 345 F. Supp. 3d 287 (E.D.N.Y. 2018); *Ramos v. Nielsen*, 336 F. Supp. 3d 1075 (N.D. Cal. 2018); *Centro Presente v. Trump*, 332 F. Supp. 3d 393 (D. Mass. 2018).

Those courts have relied on, *inter alia*, the plaintiffs' allegations that, prior to rescinding TPS status for Haiti, the President reportedly stated that Haitians "all have AIDS," that Haitian immigrant people should not be admitted into the United States through any proposed immigration plan, and that African countries are "shithole countries." *See, e.g.*, Michael D. Shear & Julie Hirschfeld David, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times (Dec. 23, 2017).[24] The President is further reported to have voiced a preference for immigrants from countries "like Norway." *See* Josh Dawsey, *Trump derides protections for immigrants from 'shithole' countries*, Wash. Post (Jan. 12, 2018).[25]

This atmosphere of hostility—which has unquestionably made the question of citizenship contentious on a national scale—would substantially amplify the chilling effect caused by the Citizenship Status Question on immigrants of color, including Black immigrants. *See Ross*, 2019 WL 1052434, at *6, *30 ("The macro-environment, particularly the political

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[24] Available at https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html/.

[25] Available at https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.3ca1973048c5.

environment around immigration, has the potential to amplify the negative effect of the citizenship question on self-response rates. . . . [A] hostile macro-environment combined with the inclusion of sensitive questions on a survey can have a cumulative effect that is greater than either of these factors would have on their own.").

This anti-immigrant rhetoric has paired with official action in multiple ways, causing immigrant populations to have significant concerns about issues such as the "Muslim Ban," as well as a general wariness of Immigration and Customs Enforcement. *See, e.g.*, Memorandum from the U.S. Census Bureau, Ctr. For Survey Measurement to Assoc. Directorate for Research & Methodology 1 (Sept. 20, 2017) ("In particular, CSM researchers heard respondents express new concerns about topics like the 'Muslim ban,' discomfort 'registering' other household members by reporting their demographic characteristics, the dissolution of the 'DACA' (Deferred Action for Childhood Arrival) program, repeated references to Immigration and Customs Enforcement (ICE), etc. FRs and FSs emphasized facing a 'new phenomenon' in the field and reported that respondents' fears, particularly among immigrant respondents, have increased markedly this year.").[26] Black immigrant people exist at the nexus of many of these issues—for example, approximately 11 percent of foreign-born Muslims in the United States identify as Black. *See Muslims in America: Immigrants and those born in*

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[26] Available at https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf.

U.S. see life differently in many ways, Pew Research Ctr. (Apr. 17, 2018).[27]

The chilling effect of the Citizenship Status Question will be amplified not just by the national political climate, but also by existing concerns regarding surveillance and over-policing among Black immigrant communities. These concerns reflect the fact that—despite zero evidence that Black immigrant people commit crimes at a greater rate than other immigrant people—while Black immigrant people comprise 7.2 percent of the noncitizen population in the United States, they comprise 20.3 percent of the immigrant people facing deportation before the Executive Office for Immigration Review on criminal grounds, compared to 10 percent of all immigrant people overall. *See* NYU Law Immigrant Rights Clinic, The State of Black Immigrants Part 2: Black Immigrants in the Mass Criminalization System 20.[28]

In sum, Black immigrant people—including Black noncitizen people—represent a sizeable portion of the overall Black population in the United States, and of the overall immigrant population. Adding the Citizenship Status Question to the 2020 census will aggravate the existing collective fears and feed on the current national environment of intense anti-immigrant and anti-Black sentiment in the United States. Given that Black people are situated at the

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[27] Available at https://www.pewforum.org/essay/muslims-in-america-immigrants-and-those-born-in-u-s-see-life-differently-in-many-ways/.

[28] Available at http://www.stateofblackimmigrants.com/assets/sobi-fullreport-jan22.pdf.

intersection of multiple hard-to-count demographics, the Citizenship Status Question threatens to deter the census participation of a group of people—citizens and noncitizens, documented and undocumented—who are already at risk of being undercounted by virtue of being Black, Black and immigrant, or Black and noncitizen. As a result, the Citizenship Status Question would have a detrimental impact on the Black population's political representation and receipt of critical public resources.

C. A complete and accurate count is necessary for racial equity.

The legacy of undercounting the Black population and its various subgroups in the United States—which is likely to worsen with the addition of the Citizenship Status Question—has concrete detrimental effects for members of the Black community. Census data is crucial not only for redistricting purposes, but also "for such varied purposes as computing federal grant-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies." *Baldridge v. Shapiro*, 455 U.S. 345, 353 n.9 (1982). Policymakers, federal agencies, and civil rights advocates rely on census data to address barriers to equal opportunity in areas such as voting rights, employment, education, housing, lending, healthcare, and criminal justice, among others. *See* Race and Ethnicity in the 2020 Census: Improving Data to Capture a Multiethnic America, The Leadership Conference & Educ. Fund 9 (Nov. 2014) [hereinafter Race and Ethnicity in the 2020 Cen-

sus].[29] Fair political representation, access to government services, and effective enforcement of civil rights laws thus all depend on an accurate census count. Adding the Citizenship Status Question would not improve citizenship data, but would depress response rates for the Black population while further entrenching the discrimination that Black people already experience in contexts that span every facet of life.

1. Political Representation

Because of the key role that census data plays in political redistricting, the Black population undercount deprives Black people of fair and equal representation. By April 1 of the year following a census year, the Census Bureau sends to each State a "redistricting file" or "P.L. 94-171 file," which includes data on population counts and selected characteristics for that State. 13 U.S.C. § 141(c); Race and Ethnicity in the 2020 Census, *supra*, at 9. The redistricting file includes information on race and the occupancy status of housing units. States use this data to draft redistricting plans for congressional and state legislative seats, as well as for local government positions such as county and city councils and school boards. *See id.* at 9. Accordingly, census data represents the foundation of political representation at all levels of government.

The undercount of the Black population results in areas with large concentrations of Black people having larger numbers of people per representative, di-

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[29] Available at http://civilrightsdocs.info/pdf/reports/Census-Report-2014-WEB.pdf.

rectly contravening the principle of "equality of representation," which underlies the one-person, one-vote rule. *See Evenwel*, 136 S. Ct. at 1131; *see also id.* at 1132 (noting that "representatives serve all residents, not just those eligible or registered to vote," and that equalizing the total population of districts "promotes equitable and effective representation"). Thus, accurate census data is necessary to ensure that redistricting files accurately reflect the composition of States and their localities.

2. Employment

After each census, the Census Bureau prepares the EEO Tabulation file, which includes data on sex, race, educational attainment, occupation, age, earnings, and unemployment status, among other things. Race and Ethnicity in the 2020 Census, *supra*, at 11. The EEO Tabulation file is then used by several government agencies—including the Equal Employment Opportunity Commission ("EEOC"), the Department of Justice, the Office of Federal Contract Compliance Programs, and the Office of Personnel Management ("OPM")—for comparing an organization's workforce with the broader labor market and therefore enabling those agencies to monitor discrimination in the workplace. *See id.* Census data also assists the EEOC and OPM in ensuring diversity and inclusion in the federal workforce. *See id.* The accuracy of census data is therefore of the utmost importance in permitting federal agencies to achieve equal employment opportunity for racial and ethnic minorities.

3. Education

Accurate census data is also crucial to safeguarding equal educational opportunities for all students. Following this Court's decision in *Brown v. Board of Education*, local governments began depending on census data to implement desegregation plans; that data remains vital today in ensuring equal access to quality education. *See* Jolie Lee, *Still apart: Map shows states with most-segregated schools*, USA Today (May 15, 2014)[30]; Chandi Wagner, School Segregation Then & Now: How to Move Toward a More Perfect Union 6 (Jan. 2017).[31] Accurately identifying school district populations allows local governments to accurately direct education funding. Specifically, census data ensures that inequities in teaching, facilities, academic programs, and other school resources can be identified and addressed, including by facilitating the use of supplemental programs to remedy the disadvantages facing schools in distressed areas. *See* Melissa Etehad, *The 2020 census could undercount 1 million kids – which means less money for California schools*, L.A. Times (July 9, 2018, 3:00 AM).[32] The use of this data ensures that all students, including Black students, other students of color, and low-income students, have access to a high-quality education. *See* Race and Ethnicity in the 2020 Census, *supra*, at 12-13; The Leadership

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[30] Available at https://www.usatoday.com/story/news/nation-now/2014/05/15/school-segregation-civil-rights-project/9115823/.

[31] Available at http://www.centerforpubliceducation.org/system/files/School%20Segregation%20Full%20Report_0.pdf.

[32] Available at https://www.latimes.com/nation/la-na-counting-children-census-20180709-story.html.

Conference Educ. Fund, Factsheet: Will Your Kids Count? Young children and their families in the 2020 census 1, 3 (last updated Apr. 17, 2018).[33] Race and ethnicity data from the census are also essential to ensuring meaningful enforcement of Title VI of the Civil Rights Act. *See* Race and Ethnicity in the 2020 Census, *supra*, at 12 (Title VI of the Civil Rights Act prohibits any state or local education agency or system from receiving federal funds when such an entity is found to be discriminating based on race or ethnicity). For example, census data can help identify situations in which local or state education policymakers have systematically allocated more money per student to areas comprised of a predominantly white population as compared to areas comprised of a predominantly Black population.

4. Fair Housing

Census data regarding race and ethnicity help public enforcement agencies, researchers, and fair housing advocates identify discriminatory practices that deny access to housing based on factors other than affordability, in violation of the Fair Housing Act. *See id.* at 13. For example, census data has helped to uncover discriminatory mortgage foreclosure practices, denial of credit, and predatory lending practices in communities of color. *See generally* National Fair Housing Alliance, *Zip Code Inequality: Discrimination by Banks in the Maintenance of Homes in Neighborhoods of Color* (Aug. 27, 2014).[34]

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[33] Available at http://civilrightsdocs.info/pdf/census/Fact-Sheet-Undercount-of-Young-Children.pdf.

[34] Available at https://nationalfairhousing.org/wp-content/uploads/2017/04/2014-08-27_NFHA_REO_report.pdf.

5. Criminal Justice

Census-based research has directly supported policymakers in addressing racial and ethnic disparities in the criminal justice system, including, for example, the Department of Justice's "Smart on Crime" initiative. *See* Ashley Nellis, The Sentencing Project, The Color of Justice: Racial and Ethnic Disparity in State Prisons 3 (Jun. 2016)[35]; *see generally* Dep't of Justice, Smart on Crime: Reforming the Criminal Justice System for the 21st Century (Aug. 2013).[36] Civil rights activists have also relied on research incorporating census data to continue to push for legislative reform to abolish the death penalty, which is plagued by racial bias, particularly towards Black defendants. Race and Ethnicity in the 2020 Census, *supra*, at 14. Census data is therefore central in helping policymakers, law enforcement agencies, and advocates work towards minimizing disparities in the criminal justice system, including those that disproportionately affect Black people.

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The varied ways that census data is used to determine political structure and government policy illustrate the importance of an accurate census. Given that the census has historically been inaccurate because of its systematic undercount of the Black population, it is particularly urgent to avoid any modification to the 2020 census that could exacerbate this

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[35] Available at https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf.

[36] Available at https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf.

well-documented historical undercounting. Any change that creates a risk of increasing such undercounting—as the Citizenship Status Question unquestionably does, *see* pp. 11-24, *supra*—should be reviewed with particular care and caution, as it risks further depriving the Black population of fair representation, freedom from racial discrimination, and equal opportunity.

II. LDF and other civil rights organizations' vast experience litigating under the Voting Rights Act confirms that the Citizenship Status Question is unnecessary to enforce Section 2 of the Act.

Despite the tremendous damage that adding the Citizenship Status Question to the census would cause Black people and other racial minorities by severely jeopardizing accurate enumeration, Petitioners insist that their decision is justified by the need to enforce Section 2 of the Voting Rights Act. That assertion is demonstrably false. LDF and other civil rights organizations have extensive and long-established experience bringing Section 2 cases under the Act. Based on that experience and as demonstrated below, we can unequivocally represent that the Citizenship Status Question is *not* necessary for enforcement of that provision.

Specifically, LDF has used the Voting Rights Act of 1965 and its amendments successfully to defend and protect minority voting rights using census data for over 50 years. No citizenship status question has been asked on the primary decennial census form since 1950—a span of almost 70 years. The civil rights laws should not be used as a pretext to justify

a policy that will undermine the very communities that Congress enacted Section 2 to protect.

1. Citizenship population data is used within the context of Section 2 vote dilution claims. Such claims allege that particular electoral maps have the effect of diluting the ability of minority voters to elect their candidates of choice and participate equally in the political process. Section 2 vote dilution plaintiffs must demonstrate that: (1) the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group is "politically cohesive," meaning that members of the minority group tend to support the same candidates of choice; and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

If the plaintiff makes this threshold showing, the court must undertake a holistic analysis to determine "whether as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Id.* at 44 (internal citation and quotation omitted). This analysis is informed by a list of "objective factors," including "the history of voting-related discrimination in the State or political subdivision," the "use of overt or subtle racial appeals in political campaigns," and "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their

ability to participate effectively in the political process." *Id.* at 44-45.[37]

Citizenship data is one piece of evidence relevant to one aspect of this multi-stage, multi-factor inquiry: whether the minority group's eligible voter population is large enough to allow minority voters to elect their candidates of choice. *See League of Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 429 (2006) (calling citizenship data a "starting point" for the Section 2 inquiry).[38] Existing data sources, including citizenship data obtained through the census long-form questionnaire, have proven more than sufficient for this threshold purpose. For the entire history of the Voting Rights Act, the Census Bureau has

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[37] The other "objective factors" are:

> the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; . . . the extent to which members of the minority group have been elected to public office in the jurisdiction . . . evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and [whether] the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous.

Thornburg v. Gingles, 478 U.S. 30, 44-45 (1986).

[38] Citizenship data may also be relevant in Section 2 vote dilution litigation to evaluate the sufficiency of remedial maps.

collected citizen voting-age population ("CVAP") data, first through the long-form census—a longer version of the standard census form sent to a subset of households—and more recently through the American Community Survey ("ACS"), which is a monthly long-form survey issued to a representative statistical sample of the U.S. population. *See* Testimony of Lawyers' Committee for Civil Rights Under Law Submitted by Kristen Clark to the U.S. House of Representatives Judiciary Committee Subcommittee on the Constitution and Civil Justice Hearing on "Questions Regarding the U.S. Census" at 3-4 (June 8, 2018). Monthly ACS data is then provided using rolling averages to ensure reliable estimates. *See* Chand et al., *Multi-Year Averages From a Rolling Sample Survey*, U.S. Census Bureau, at 1 (2000).[39] Moreover, many States and localities track political participation data by race—this includes data on voter registration and turnout rates. *See* Letter from Native American Voting Rights Coalition to Jennifer Jessup 5 (Aug. 7, 2018) [hereinafter NAVRC letter] (discussing how political participation data can be used to support a Section 2 Voting Rights Act claim).

2. Civil rights organizations, such as LDF, the Lawyers' Committee for Civil Rights Under Law, and the Mexican American Legal Defense and Educational Fund ("MALDEF"), have used the existing data to bring successful Section 2 vote dilution cases. *See, e.g., Terrebonne Parish Branch NAACP v. Jindal*, 274 F. Supp. 3d 395, 420 (M.D. La. 2017); *Georgia State Conference NAACP v. Fayette Cnty. Bd. of Commr's*, 118 F. Supp. 3d 1338, 1343-44 (N.D.

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[39] Available at https://www.census.gov/content/dam/Census/library/working-papers/2000/acs/2000_Chand_01.pdf.

Ga. 2015); Testimony of Lawyers' Committee for Civil Rights Under Law Submitted by Kristen Clarke to the U.S. House of Representatives Judiciary Committee Subcommittee on the Constitution and Civil Justice Hearing on "Questions Regarding the U.S. Census" at 3-4 (June 8, 2018); MALDEF Letter, *supra*, at 4. Far from calling the sufficiency of this data into question, and contrary to the assertions of *amicus* the Public Interest Legal Foundation, this Court and others have routinely upheld the use of existing data sources in the Section 2 vote dilution context. *See, e.g.*, *LULAC*, 548 U.S. at 423-42 (finding vote dilution under Section 2 using CVAP data); *Barnett v. City of Chicago*, 141 F.3d 699, 702-04 (7th Cir. 1998) (holding that existing CVAP data was adequate to ensure equality of voting power under the Voting Rights Act); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569-70 (11th Cir. 1997) (recognizing that the "use of sample data is a long-standing statistical technique" and finding existing citizenship data sufficient in the Section 2 vote dilution context); *Corbett v. Sullivan*, 202 F. Supp. 2d 972, 984-85 (E.D. Mo. 2002) (considering political participation data in evaluating redistricting proposals for compliance with Section 2). As explained by Judge Furman in this case, "there is no indication in the record that the Department of Justice and civil rights groups have ever, in the fifty-three years since the Voting Rights Act was enacted, suggested that citizenship data collected as part of the decennial census would be helpful, let alone necessary, to litigate such claims." *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 808 (S.D.N.Y. 2018).

3. Beyond the fact that existing data collected by the Census Bureau is plainly sufficient for Section 2

enforcement purposes, new citizenship data collected from the decennial census in response to the Citizenship Status Question would be *less*, not more, accurate. *See Ross*, 2019 WL 1052434, at *63; NAVRC Letter, *supra*, at 5. As explained, pp. 11-17, *supra*, census data relies on self-reporting and is prone to undercounting, particularly of members of minority groups. *See Ross*, 2019 WL 1052434, at *11. By contrast, data derived from statistical sampling is corrected to account for disparate response rates, diminishing undercounting concerns. *See* American Community Survey Design and Methodology, Chapter 11, Weighting and Estimation, U.S. Census Bureau 10 (Rev. Dec. 2010) [hereinafter Weighting and Estimation].[40] Political participation data does not rely on self-reporting at all. *See Ross*, 2019 WL 1052434, at *63. Thus, existing citizenship data is, if anything, *more accurate* than the data Petitioners seek to collect with the Citizenship Status Question. *See, e.g.*, *id.*; MALDEF Letter, *supra*, at 6-7. Moreover, decennial census data captures only a snapshot of the U.S. population every ten years.[41] By contrast, ACS

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[40] Available at https://www.census.gov/content/dam/Census/library/publications/2010/acs/Chapter_11_RevisedDec2010.pdf.

[41] Amici Oklahoma et al. highlight (at 15) the ACS's 1-year estimates as being "only reliable for 65,000 people or more," but ignore the fact that, in practice, it is the 5-year estimate produced by ACS that is used in Section 2 litigation, *not* the 1-year estimate. *See* Chand et al., *Multi-Year Averages From a Rolling Sample Survey*, U.S. Census Bureau, at 1 (2000), https://www.census.gov/content/dam/Census/library/working-papers/2000/acs/2000_Chand_01.pdf; *see also Citizen Voting Age Population by Race and Ethnicity*, Census.gov (Feb. 1, 2018), https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.2019.html (identifying the Census Bureau's data on citizen voting age population by race and

CVAP population averages are based on monthly surveys, which capture population trends over time. *See* Weighting and Estimation, *supra*, at 5. Treating citizenship data from the decennial census as more reliable than ACS CVAP data would therefore threaten to obscure population trends, even though the growth rates of minority populations often far exceed those of white populations. *See, e.g., Benavidez v. City of Irving, Tex.*, 638 F. Supp. 2d 709, 730 (N.D. Tex. 2009) (relying on ACS data to determine growth trend of Hispanic CVAP and finding a violation of Section 2 of the Voting Rights Act).

Compounding this harm is the likelihood that, as explained, pp. 17-20, *supra*, the Citizenship Status Question would depress response rates of immigrant communities, making any new citizenship data even less reliable. The sufficiency of existing data sources, and Petitioners' inability to show that the Citizenship Status Question would help, rather than hurt, the Census Bureau's ability to obtain accurate citizenship data, further supports Judge Furman's assessment that the "evidence suggest[s] that Secretary Ross's stated rationale for adding the [citizenship status] question is pretextual." *New York*, 315 F. Supp. 3d at 775; *see also Ross*, 2019 WL 1052434, at *1 ("These facts and other evidence . . . demonstrate that Secretary Ross's reliance on VRA enforcement to justify inclusion of the citizenship question was mere pretext[.]"). This pretextual justification, part of a long and shameful history of manipulating the census to avoid an accurate enumeration of the Black population, should be rejected.

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ethnicity as "sourced from the American Community Survey (ACS) 5-year estimates").

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Simply put, the civil rights organizations that have successfully enforced Section 2 of the Voting Rights Act since its inception are nearly unanimously opposed to the addition of the Citizenship Status Question. *See, e.g.*, MALDEF Letter, *supra*; NAVRC Letter, *supra*. There is no evidence supporting Petitioners' assertion that the addition of the Citizenship Status Question to the 2020 census would enable better Section 2 enforcement—in fact, the opposite is true. Using a pretextual appeal to the Voting Rights Act to undermine the same communities that the Act was enacted to protect constitutes unquestionably arbitrary and capricious, and potentially discriminatory, government action.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

SHERRILYN A. IFILL
JANAI S. NELSON
SAMUEL SPITAL
LEAH C. ADEN
AARON SUSSMAN
J. ZACHERY MORRIS
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200

DAVID J. ZIMMER
Counsel of Record
JOSHUA J. BONE
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210
dzimmer@goodwinlaw.com

TIFFANY MAHMOOD
WILLIAM UHR
MADELINE DILASCIA
GOODWIN PROCTER LLP

Counsel for Amicus Curiae

April 1, 2019